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No. 99-699

In the

Supreme Court of the United States

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent,

On Petition for a Writ of Certiorari to the
Supreme Court of New Jersey

AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the Voice of America Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we are particularly concerned that the liberty interests of the Boy Scouts to promote their traditional moral

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

values is properly understood.

SUMMARY OF ARGUMENT

This case present critically important issues of personal liberty and constitutional protections for that liberty that warrant granting the petitioners requested writ of certiorari. The decision of the New jersey Supreme Court below would suppress the freedom of citizens to form private, voluntary organizations to advance the moral principles in which they believe. It would constrain them instead towards advancing only the moral principles approved by the state.

The Boy Scouts of America is a large national organization with millions of members, and its freedom of speech and freedom of association is important enough alone for the Court to take this case. But, more broadly, we think this case raises crucial questions regarding the freedom of private, voluntary organizations to advance and teach traditional moral values which may be politically incorrect and even formally disapproved by the state. Most broadly, we think this case implicates the freedom of everyone to organize groups to advance views and values of which the state may disapprove.

The decision of the New Jersey Supreme Court below violates the U.S. Constitution in at least three ways, in direct conflict with established precedents of this Court. First, the ruling violates the freedom of speech of the Boy Scouts. Second, the decision violates the right to expressive association by the Boy Scouts. Third, the decision violates the Boy Scouts' right to intimate association.

Respondent James Dale has no interest in serving as a Boy Scout leader that would remotely come close to outweighing these benefits. The Boy Scout organization is for the boys, not for the Scout leaders. It is not a vehicle for the Scout leaders to advance their personal interests or agendas, or to pursue commercial or business interests or activities. Indeed, the only interest Dale has asserted in seeking to force his acceptance as a Scout leader is his desire to impose his own, differing values on the organization. He says that through his forced leadership he wants to point out to the organization "how bad and wrong" their policy regarding homosexuality is. That is not a valid, legitimate interest to outwiegh the liberty interests of the Boy Scouts discussed above.

Finally, the decision of the court below creates an effective, highly troubling conflict with prior decisions of four state Supreme Courts and one Federal court of appeals, all of which ruled against parties claiming that public accommodation statutes require the Boy Scouts to admit members or leaders that the organization denied as not complying with its standards for membership or leadership. The guidance of this Court is urgently needed to avoid an avalanche of lawsuits over these issues and further conflict in the law.

ARGUMENT

I. THIS CASE PRESENTS CRITICALLY IMPORTANT ISSUES REGARDING CONSTITUIONALLY PROTECTED PERSONAL LIBERTIES

The ACRU joins in asking the Court to grant the petition for a writ of certiorari in this case because we believe it presents critically important issues of personal liberty and constitutional protections for that liberty. The decision of the New Jersey Supreme Court below would suppress the freedom of citizens to form private voluntary organizations to advance the moral principles in which they believe. It would constrain them instead towards advancing only the moral principles approved by the state.

Throughout this century, millions and millions of American boys have participated in the Boy Scout program. That program is not primarily social or recreational. The point of the program is to teach the boys sound moral values. Its various activities are all geared to reinforcing that central goal. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 697, 952 P.2d 218, 236 (1998) (The Boy Scouts is a "charitable, expressive, and social organization" whose "primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose.")

The Boy Scout program advances traditional virtues such as honesty, courage, reverence, hard work, patriotism, thriftiness and others. This also includes traditional family

values, emphasizing marriage and fatherhood for the boys. As a result, the boys are taught that heterosexual sex before marriage, adultery, and heterosexual promiscuity are all wrong. Concomitantly, they are taught that homosexual activity is morally wrong as well.

The Boy Scouts of America is not just a group of outsiders to the boy. Parents, particularly fathers, are also involved in the program and its various activities, often volunteering to serve as the local leaders. Neighbors and fellow church members generally fill out the rest of the local leadership pool.

Have we reached the point in America where parents and socially minded citizens cannot join together to form an organization to teach boys traditional moral values, including that they should not engage in homosexual activity and that it would be morally wrong for them to do so? That is the result of the decision of the New Jersey Supreme Court below. As Co-President of the Rutgers University Lesbian/Gay Alliance, Dale is leading a high profile public campaign propounding the opposite of the view of the Boy Scouts regarding homosexual conduct. (A.3371-A.3374; A.3384).[2] He states publicly that he disagrees with the Boy Scout position on this issue, that he personally engages in homosexual conduct, and that he owes it to the Boy Scouts "to point out to them how bad and wrong" their position on homosexuality is. (14a; 110a; A.3384).

Consequently, for the Boy Scouts to accept Dale as a

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[2] Numbers preceded by "A." refer to pages in the record before the New Jersey Supreme Court. Numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari.

leader in their organization would completely nullify their position regarding homosexual conduct. Surely it would send a clear signal to all of the boys that Boy Scout teaching regarding homosexual conduct is not to be taken seriously. And if nonmarital homosexual conduct is acceptable, then how can premarital heterosexual conduct not be? Indeed, if Boy Scout leaders can be active homosexuals publicly advocating that lifestyle, how can the Boy Scouts effectively maintain teachings regarding marriage and fatherhood? Certainly these leaders could not propound that message and their presence in the organization would directly contradict it. As a result, the entire Boy Scout doctrine regarding family life and sexual activity would break down.

Mr. Dale may engage in whatever personal conduct he desires. He may publicly advocate the views and values in which he believes. He may openly criticize the Boy Scouts and the values they espouse. What he may not do is impose his own views and values on the Boy Scouts by forcing them to accept him as a leader, despite his openly expressed views and conduct directly contradicting the values the organization seeks to teach. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)("There can be no clearer example of an intrusion into the internal structure or affairs of an organization than a regulation that forces the group to accept members it does not desire."). Yet, that is the result of the decision of the New Jersey Supreme Court below.

That decision was clearly and openly grounded in animus towards the very values the Boy Scouts seek to advance. The court actually stated that in its view the position of the Boy Scouts on homosexuality is "based on little more than prejudice" and denounced it as "bigotry". (59a;61a). In a concurring opinion, Justice Handler stated that it is "untenable" for the Boy Scouts to remain "entrenched in the social mores that existed at the time of its inception" (100a) which the court effectively ruled are now outdated and socially unacceptable, if not outright illegal.

The New Jersey court is apparently socially unaware that tens of millions of Americans believe in the moral values espoused by the Boy Scouts, including the values regarding homosexuality. Millions and millions believe as well that these views regarding homosexual conduct are directly derived from the words of the Bible and Judeo-Christian doctrines. Major religious denominations support this position. To rule that this is simply stupid bigotry is to pit the power of the state against these traditional, religiously based beliefs.

If this precedent is allowed to stand today, then where will such legal doctrines lead in the future? It would seem that the very freedom of citizens to join together with private voluntary organizations to advance traditional moral values would ultimately be threatened. If the values the group seeks to promote are politically incorrect or otherwise disapproved by the state, we seem to be approaching the point where the state can force the group to accept as members, or perhaps even leaders, others who disagree with the group's values and will insist it promote the politically correct view. If these traditional values can be legally styled as simple bigotry and prejudice, then how long will it be before actions undertaken to promote them are found to constitute illegal discrimination or even hate crimes? How long before organized efforts to

teach these supposedly bigoted, prejudiced values to children are themselves condemned as illegal discrimination or even child abuse?

More broadly, such doctrines threaten the rights of everyone. For if groups advancing traditional moral values can ultimately be restricted to promoting only the values approved by the state, this will be true for every other group as well, including groups of antiwar activists, draft protesters, antitax agitators, and even gay and lesbian groups. If today the Boy Scouts can be forced to accept a homosexual activist as a leader, then under a different political climate a gay/lesbian group officially recognized by a public university may be forced to accept as members or even leaders fundamentalist Christians who want to use the group to urge homosexuals to abandon their sexual practices.

All of this raises critical issues of constitutionally protected freedom of speech and freedom of association which this Court should decide. The Boy Scouts of America is a large national organization with millions of members, and its freedom of speech and of association is important enough alone for the Court to take this case. But, more broadly, we think this case raises crucial questions regarding the freedom of private voluntary organizations to advance and teach traditional moral values which may be politically incorrect and even formally disapproved by the state. Most broadly, we think this case implicates the freedom of everyone to organize groups to advance views and values of which the state disapproves.

II. THE DECISION BELOW VIOLATES THE FREEDOM OF SPEECH AND OF ASSOCIATION OF THE BOY SCOUTS, IN CONFLICT WITH ESTABLISHED PRECEDENTS OF THIS COURT.

We agree with Petitioners that the decision of the New Jersey Supreme Court violates the U.S. Constitution in at least three ways. First, the ruling of the court violates the freedom of speech of the Boy Scouts. As discussed above, forcing the Boy Scouts to accept Dale as a scout leader when he openly challenges, by word and by deed, values the organization is trying to communicate to boy scouts cripples the ability of the organization to send its message. Rather, it forces the organization to send the contrary messages Dale wants to send. See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Boyd v. Harding Academy of Memphis, Inc.* 88 F.3d 410 (CA6 1996); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (CA8 1987); *McConnell v. Anderson*, 451 F.2d 193(CA8 1971); *Harvey v. YWCA*, 533 F.Supp. 949 (W.D.N.C. 1982).

Secondly, the decision below violates the right to expressive association by the Boy Scouts. As discussed above, the purpose of the Boy Scouts is to teach the boys sound moral values, including the traditional values regarding marriage, fatherhood, and sex. To force the Boy Scouts to accept Dale as a leader violates the group's right to associate with who they want, in order to send the messages they want. *Hurley; Democratic Party of United States v. Wisconsin ex. rel. LaFollete*, 450 U.S. 107, 122 (1981); *Roberts*, 468

U.S. at 623, 633-636 (O'Connor J., concurring); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York,* 487 U.S. 1 (1988). *See also Minnesota State Bd. For Community Colleges v. Knight, 465 U.S. 271 (1984).*

Thirdly, the decision violates the Boy Scouts' right to intimate association. Boy Scout activities involve utterly private, intimate associations between family, friends and neighbors. Scout troops take private hikes and camp out together in remote areas. Scouts and their leaders engage in personal communications on moral and intimate subjects. Their meetings are closed to outsiders except during periods when prospective recruits and their parents may attend. No commercial or business activities are involved. Even membership by the boys is not automatically open to all comers, but is subject to the discretion and choice of the leaders.

Outsiders should have no right to force their way into such a private, intimate group. Doing so by force of the state violates a basic constitutional right of citizens and groups to choose their own intimate associations. We agree with petitioners that if the Boy Scouts do not qualify for constitutional protection as a private, intimate group, then no group other than a family would.

Finally, Dale has no interest in serving as a Boy Scout leader that would remotely come close to outweighing these rights of the Boy Scouts. The Boy Scout organization is for the boys, not for the Scout leaders. The point of the organization is to teach the boys sound moral values, help them develop bonds with friends, neighbors, and their community,

and foster enjoyable experiences for them such as camping trips and other activities. The organization is not a vehicle for advancing the personal interests of Scout leaders. Parents may enjoy serving as Scout leaders for their children, but that is not an interest for Dale. Neighbors may enjoy serving as Scout leaders to provide service for their local community and its children, but that pales to insignificance compared to the core liberty interests of the Boy Scouts discussed above. Moreover, Dale has many other avenues for serving his local community.

In fact, the only interest Dale has asserted in forcing his acceptance as a Scout leader is his desire to impose his own, differing values on the organization. He says that through his forced leadership role he wants to point out to the organization "how bad and wrong" their policy regarding homosexuality is. That is not a valid, legitimate interest to outwiegh the liberty interests of the Boy Scouts discussed above.

This all should have been made clear by this Court's decision in *Hurley*, which is directly contradicted by the decision of the New Jersey Supreme Court below. In that case, this Court held unanimously that forcing private organizers of a St. Patrick's Day parade to include the Gay, Lesbian and Bisexual Group of Boston (GLIB) under a state antidiscrimination statute was unconstitutional. Such forced participation by GLIB, the Court said, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right to decide "what not to say." 515 U.S. at 573. The Court recognized that GLIB

wanted to force its way into the parade to send its own message, but the organizers of the parade had a constitutionally protected right to decide that they didn't want to send that message in their parade.

Quite similarly, forcing the Boy Scouts to accept Dale as a leader would violate the group's free speech right to choose the content of their own message. For as discussed above, if the Boy Scouts must include gay activists such as Dale as leaders, then their message regarding homosexual activity and, indeed, their entire doctrine regarding family life and sexual conduct would break down. Moreover, just as with GLIB in *Hurley*, Dale wants to force his way into the Boy Scouts as a leader to send his own message regarding homosexual activity, directly contrary to the Boy Scouts' message. Even more clearly than for the parade organizers in *Hurley*, who had no position on homosexuality, the Boy Scouts have a constitutionally protected right to decide that they don't want to send Dale's message directly contradicting their own.

III. THE DECISION OF THE COURT BELOW CREATES A CONFLICT WITH THE DECISIONS OF OTHER COURTS THAT THIS COURT NEEDS TO RESOLVE

Four state supreme courts and one Federal court of appeals have ruled against parties claiming that public accommodation statutes require the Boy Scouts to admit members or leaders that the organization denied as not complying with its standards for membership or leadership. *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992),

aff'd, 993 F.2d 1267 (CA7), *cert. Denied*, 510 U.S. 1012 (1993); *Curran; Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

In these cases, the courts reached their results by interpreting the statute as not applying to the Boy Scouts because it is a private expressive organization. Consequently, they did not explicitly rule that the Scouts have constitutional protection against forced membership or leadership.

Nevertheless, we agree with petitioners that the decision of the New Jersey Supreme Court effectively contradicts these decisions. Courts who believe that the constitutional protections do apply to the Scouts are quite likely to construe the statute before them as not applying to the Scouts. Only courts who believe as the New Jersey Surpeme Court below who believe that the Scouts are not constitutionally protected will reach the constitutional question directly. As a result, there will probably never be a more direct conflict than we have now. Yet, we do have an effective and practical conflict between the majority of courts who believe the Scouts are constitutionally protected from public accommodation laws and those who believe they are not. This Court needs to resolve this issue to avoid an avalanche of litigation imposed on the Boy Scouts and to prevent still further conflicts from developing as a result.

CONCLUSION

For all of the above reasons, we urge the Court to grant the requested *writ of certiorari*.

Respectfully submitted,

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